

February 2020

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Review was granted in the following cases during the month of February 2020:

Marshall Justice v. Rockwell Mining, LLC, Docket No. WEVA 2018-48-D (Judge Paez, January 6, 2020)

Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2019-0008 (Judge Lewis, December 30, 2020)

No case review was denied in the following during the month of February 2020.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 3, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

GMS MINE REPAIR & MAINTENANCE,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-0126
A.C. No. 36-07230-493700

Mine: Bailey Mine

DECISION AND ORDER

Appearances: Ryan C. Atkinson, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the Petitioner

William C. Means, Esq., Andrew J. Ellis, Esq., GMS Mine Repair &
Maintenance, Inc., Bruceton Mills, West Virginia, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act” or “Act”), 30 U.S.C. § 815(d). At issue is one citation issued to Respondent GMS Mine Repair & Maintenance, Inc. (“GMS”), under Section 104(a) of the Mine Act.

A hearing was held in Morgantown, West Virginia, on January 14, 2020, at which time testimony was taken and documentary evidence was submitted. I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given.

After consideration of the evidence, I dismiss the Section 104(a) citation for the reasons set forth below.

B. Stipulations

1. Consol Energy (“Consol”) is the owner/operator of the Bailey Mine. At the time that the citation at issue in this proceeding was served, Respondent GMS was an independent contractor performing services at said mine and was therefore an “operator” at said mine as the term “operator” is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
2. Bailey Mine is a “mine” as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of GMS at the mine at which the citation was issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (“FMSHRC”) and its designated Administrative Law Judges (“ALJ”) pursuant to Sections 105 and 113 of the Mine Act.
5. Payment of the total proposed penalty of \$22,113.00 in this matter will not affect GMS’s ability to continue in business.
6. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary when the citation was issued, provided however that this stipulation should not be construed as an admission by GMS of culpability regarding the subject matter of said citation.
7. The Citation contained in Docket No. PENN 2019-0126 was issued and served by a representative of the Secretary upon an agent of GMS at the date, time, and place stated in the citation.
8. Exhibit “A” attached to the Secretary’s Petition in Docket No. PENN 2019-0126 contains an authentic copy of Citation No. 9074949 with all modifications or abatements, if any.
9. Although the parties disagree as to whether the application of 30 C.F.R. § 75.1403 is properly limited to hoists or mantrips, the parties stipulate that no hoist or mantrip (as those terms are used in 30 C.F.R. § 75, Subpart O) was involved in the accident which gave rise to this case.

Jt. Ex. 1.¹

¹ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered Ex. P-1 to P-8. In addition, the Secretary submitted the Respondent’s assessed violation history report as Ex. P-17. The Respondent did not file any exhibits. The joint stipulations are referred to as Jt. Ex. 1 and Jt. Ex. 2.

The parties have also submitted the additional joint stipulations:

1. The service contract between GMS and Consol (the owner-operator of Bailey Mine) contains provisions which contractually obligate GMS to adhere to mandatory safety and health standards.

2. Notices to provide safeguard are not expressly mentioned within the text of the GMS-Consol contract; however, GMS conceded that it is not manifestly unreasonable to construe the aforementioned contractual obligation as including a duty of GMS to Consol to be familiar with directives laid out in those notices to provide safeguard which the Mine Safety and Health Administration (“MSHA”) has served on Consol at the mine(s) where GMS performs services for Consol and, to the extent that said notices are applicable to GMS’s assigned work, to adhere to those directives.

3. GMS has received from Consol a summary of thirty-five notices to provide safeguard which MSHA served upon Consol at the Bailey Mine from 1993 to present, one of which is Notice to Provide Safeguard No. 7068632 (“Safeguard No. 7068632”) at issue in the case at bar.

4. During its site-specific safety training and/or its annual refresher safety training of GMS personnel who perform services at Bailey Mine, GMS does include discussions of notices to provide safeguard.

5. On August 7, 2018, at the Bailey Mine, GMS personnel were attempting to use a one-man-operated piece of equipment known as a “mule” (which is neither a mantrip nor a hoist within the meaning of 30 C.F.R. § 75, Subpart O) to move a longwall shield a short distance away from the mine face.

6. The mule got stuck in place, whereupon GMS personnel attached a cable to an anchor point in the mine roof in an attempt to get the equipment unstuck.

7. A hook clevis on the mule—to which the cable was attached—broke, whereupon the hook traveled 33 feet through the air and struck a miner.

8. Upon investigating the foregoing accident, MSHA issued three citations to GMS.

9. One of the three citations alleged that the condition of the hook clevis had deteriorated and therefore, GMS had operated a piece of equipment which was in unsafe condition. During and/or in conjunction with a citation conference, GMS opined that the deteriorated part of the hook clevis was blocked from view by other parts of the equipment. Nevertheless, GMS accepted responsibility, did not further contest the citation, and paid the assessment for the same. Accordingly, that issue is resolved and closed.

10. Another of the three citations alleged that GMS had violated the roof control plan by attaching a cable to part of the roof control system. During and/or in conjunction with a citation conference, GMS opined that the anchor to which the cable was attached was a supplemental roof bolt in excess of the roof-bolting requirements. Nevertheless, GMS accepted

responsibility, did not further contest the citation, and paid the assessment for the same. Accordingly, that issue is resolved and closed.

11. Another of the three citations, i.e., the one citation now at issue, alleges that GMS violated a notice to provide safeguard. The specific notice to provide safeguard is not mentioned in the body of the citation. The specific notice to provide safeguard has since been identified as Safeguard No. 7068632.

12. Within the Mine Act's definition of the term "operator," GMS—as a provider of services at Bailey Mine—is "an operator" at Bailey Mine separate and distinct from owner-operator Consol.

13. It is undisputed that no authorized representative of the Secretary has ever advised GMS in writing of Safeguard No. 7068632, nor did the Secretary ever fix a time within which operator GMS could have addressed the content or validity of that specific safeguard notice before the Secretary's representative served GMS with the one citation which is still at issue in this matter.

Jt. Ex. 2.

II. BACKGROUND

On August 1, 2018, an accident occurred at the Bailey Mine—an underground coal mine in Pennsylvania that is owned and operated by Consol. Tr. 31; Jt. Ex. 1, 2. Subsequently, MSHA conducted an investigation of the circumstances surrounding the accident. Tr. 31. At the time of the accident and investigation, GMS was performing services at the Bailey Mine as an independent contractor. Jt. Ex. 1.

After the accident investigation concluded on August 7, 2018, MSHA inspector Robert Revi² issued Citation No. 9074949³ to GMS on the basis that GMS violated 30 C.F.R. § 75.1403⁴ by failing to adhere to the mandate of Safeguard No. 7068632. Ex. P-1; Jt. Ex. 2. Safeguard No. 7068632, which was issued to Consol on February 13, 2006, states:

On September 22, 2005, employees were moving a belt drive motor into location for the new 9-H section belt. They were pulling the drive motor into place with a 3/4 inch cable laced through two sheave wheels The chain which was attached to the sheave at the flat car broke, and a link from the chain flew into the track chute and struck the victim in the face causing severe facial injuries. The victim was approximately 25 to 30 feet away from the chain when it broke.

² Revi has been an MSHA employee for eight years and serves as a certified mine inspector. Tr. 23. Prior to his employment with MSHA, Revi was employed by Consol for ten years, was employed by Emerald Mine, and was employed by GMS. Tr. 24. Revi has received training at the National Mine Health and Safety Academy in Beckley, West Virginia—including accident investigation training—and holds various licenses and certifications related to mining. Tr. 24. In total, Revi has approximately 20 years of coal mining experience. Tr. 24-25.

³ The narrative portion of Citation No. 9074949 states:

An accident occurred at Bailey Mine in the 6J Longwall tear down between the 2/3 crosscut at spad 1+75, area on August 1st, 2018 injuring one miner. The Pettito Electric mule was being used to recover shield from the longwall face when it got stuck in the number 3 intersection at spad # 1+75. In the process of attempting to free the mule, the hook and hook clevis broke. The hook and hook clevis was propelled a distance of 33 feet striking a miner in the head.

Ex. P-1.

⁴ Mirroring Section 314(b) of the Mine Act, this regulation states “[o]ther safeguards adequate . . . to minimize hazards with respect to transportation of men and materials shall be provided.” 30 C.F.R. § 75.1403; *see also* 30 U.S.C. § 874(b).

This is a notice to provide the following safeguard:

When using chains and or cables to move equipment into location all workers are to be located in a position so that they will not be injured should any portion of the chain or cable fail.

Ex. P-4.

III. LEGAL PRINCIPLES

An operator is strictly liable for Mine Act violations. *Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1650 (July 2016) (citing *Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009)). The Secretary bears the burden of proving any alleged violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Section 314(b) of the Mine Act provides for safeguards that “inform[] the mine operator about conduct that is mandated or prohibited . . . involving transportation of miners and materials.” *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 157 (Feb. 2016). The Secretary effectuates Section 314(b) “by authorizing inspectors to issue safeguards on a mine-by-mine basis.” *Oak Grove Res., LLC*, 37 FMSHRC 2687, 2688 (Dec. 2015); *see also Big Ridge, Inc.*, 37 FMSHRC 213, 214 n.4 (Feb. 2015) (noting that safeguards “are[,] in effect, mandatory safety standards issued on a mine-by-mine basis” (citation omitted)). Inspectors, as representatives of the Secretary, issue the safeguards in writing to the operator, and must also “indicate[] a time by which the operator must provide and subsequently maintain that safeguard.” *Oak Grove Res., LLC*, 37 FMSHRC at 2688 (citing 30 C.F.R. § 75.1403-1(b)). An inspector may then issue a citation to that operator for safeguard noncompliance. *Oak Grove Res., LLC*, 37 FMSHRC at 2688 (citing *Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1204 (D.C. Cir. 2011)).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

There are three issues that must be addressed in this matter: (1) whether an independent contractor is bound by safeguards issued to the owner / operator of a mine; (2) whether Safeguard No. 7068632 is facially valid; and (3) whether Safeguard No. 7068632 applies to GMS based on the instant facts. For the reasons set forth below, the answer to each question is “no,” and, therefore, Citation No. 9074949 must be vacated.

A. Whether an Independent Contractor Is Bound by Safeguards Issued to the Owner / Operator of a Mine

“When ‘a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.’” *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995) (quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982)). The language of Section

75.1403-1(b) clearly states that “the Secretary *shall in writing advise the operator* of a specific safeguard which is required pursuant to [Section] 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard.” 30 C.F.R. § 75.1403-1(b) (emphasis added). It is undisputed that the Secretary neither “in writing advise[d] [GMS] . . . of a specific safeguard,” nor fixed a time for compliance with the safeguard. *Id.*; Jt. Ex. 2.

The Secretary argued that “mine-by-mine basis” means safeguards are perpetually enforceable against all operators present at the mine property, not just against the operator that was served with the safeguard in writing. Tr. 14, 27-28. Further, counsel for the Secretary agreed that, under this interpretation, once a safeguard is issued to an operator, that safeguard could be in effect and enforceable against all operators present at the mine for 20, 30, 40, 50 years, or even forever. Tr. 14-15. However, the Secretary admitted that there is no legal precedent—case law, legislative history, or prior application of this interpretation—to support such a position. Tr. 15-16. Furthermore, the Commission has never been confronted with such an interpretation.

I find that the Secretary’s interpretation is incorrect. The Commission has explained that issuing safeguards on a “mine-by-mine” basis means only that the safeguards need to “address[] a specific transportation hazard actually determined by an inspector to be present and in need of correction at the mine in question.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 9 (Jan. 1992) (“*SOCCO I*”). An interpretation that permanently extends the scope of “mine-by-mine” to all operators at a mine site goes against the express language of the regulation and has no demonstrable support. Section 75.1403-1(b) clearly indicates that the Secretary “shall in writing advise *the operator*” of the safeguard, and says nothing about the enforcement of safeguards against other distinct and separate operators that were not advised in writing by the Secretary. 30 C.F.R. § 75.1403-1(b) (emphasis added); *see also BethEnergy Mines, Inc.*, 14 FMSHRC 17, 23-24 (Jan. 1992) (“Section 75.1403-1(b) makes clear that the safeguard criteria *are not binding on any particular operator* unless, and until, that operator is given notice, in a written safeguard from an authorized representative of the Secretary.” (emphasis added)); *SOCCO II*, 14 FMSHRC at 7.

In addition, Inspector Revi testified that, in his experience, mine inspectors typically issue safeguards after an operator has received several violations of the same type and the inspector puts the operator on notice. Tr. 26-27. Such activity by an operator would then justify the issuance of a safeguard and, subsequently, validate the issuance of citations for violating that safeguard—should that violative condition or practice continue. Tr. 27. Inspector Revi’s testimony underscores the fact that a *specific operator* is to be put on notice and bound by a specific safeguard, not any independent contractor on the mine property at any time after the safeguard is issued.

The Secretary also argued that the contractual agreement between GMS and Consol obligated GMS to adhere to the mandate of Safeguard No. 7068632 because that agreement required GMS to comply with the Mine Act. Tr. 9, 48; Ex. P-2. It is true that GMS was contractually required to “comply with the provisions of the [Mine Act] and the [r]ules and [r]egulations applicable thereto,” and it is also true that GMS admitted it was aware of all safeguards at Bailey Mine (including Safeguard No. 7068632). Ex. P-2 at 6; Jt. Ex. 2. However, awareness is not equivalent to the express requirement in Section 75.1403-1(b) that the Secretary

provide written, individualized notice to GMS. A private employment contract between a mine owner and an independent contractor does not authorize the Secretary to enforce a safeguard that was issued to the mine owner and is otherwise unenforceable against the contractor.

In contrast to the Secretary's arguments, GMS argued that the Secretary's interpretation runs counter to the principles of due process because GMS lacked notice that the Secretary would enforce Safeguard No. 7068632 without first advising GMS of said safeguard in writing. Tr. 19, 50. Although I decline to address the constitutional argument raised by GMS, some further analysis is warranted. First, it is important to note that Safeguard No. 7068632 is not a regulation that has gone through the rulemaking process; it is an entirely different exercise of authority by the Secretary. *See Pocahontas Coal Co., LLC*, 38 FMSHRC at 165 ("Congress chose not to subject safeguard notices to the notice-and-comment rulemaking required for mandatory standards." (citing *Wolf Run*, 659 F.3d at 1202-03)); *see also Oak Grove Res., LLC*, 35 FMSHRC 2009, 2011-12 (July 2013). Here, GMS is a separate and distinct legal entity from Consol, the operator that received Safeguard No. 7068632 in writing. Jt. Ex. 2. Furthermore, Safeguard No. 7068632 was issued more than 10 years prior to the issuance of Citation No. 9074949, and GMS had no official notice or opportunity to comply with that safeguard before being issued a citation.⁵ Ex. P-4.

Neither the Act nor the safeguard regulation by its language includes any other entities *but the operator to which the safeguard was issued* as being bound by that safeguard. The Secretary's interpretation, a new one at that, would lead to absurd results should each safeguard bind any and all independent contractors, subcontractors, and their successors in interest indefinitely. Therefore, the SOL's new interpretation is not to be afforded deference here. The language of Section 75.1403-1(b) is not ambiguous. Even if Section 75.1403-1(b) was ambiguous in its coverage, the Secretary's position would still fail as an unreasonable interpretation of that regulation. I find that the Secretary's position—which the Secretary admitted is unsupported by precedent and has never been advanced before—is not the authoritative or official position of the agency, but instead a convenient litigation position that creates unfair surprise to GMS. "Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme," and "when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar." *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2413 (2019). The Commission and its judges have on numerous occasions stated in unequivocal language that the Secretary should engage in the proper rulemaking procedures to regulate the transportation of miners and materials in underground coal mines. *See, e.g., Wolf Run*, 659 F.3d at 1203 (citing *SOCCO II*, 14 FMSHRC at 16); *cf. Tr. 46* (describing the threat of a chain or cable breaking as a possibility "at any mine or any industry").

In sum, only the operator that was advised of the safeguard in writing may be held responsible for implementing the remedial measures prescribed by that safeguard or penalized for failing to do so. Therefore, Safeguard No. 7068632 is not applicable to GMS.

⁵ Again, Inspector Revi's testimony that safeguards are typically issued after an operator has committed several violations of the same type—and the operator is put on notice before the safeguard is issued and enforced—supports GMS's argument that it had no fair notice of, or chance to comply with, Safeguard No. 7068632. Tr. 26-27.

B. Whether Safeguard No. 7068632 Is Facially Valid

In addition to Safeguard No. 7068632 not applying to GMS because GMS was never advised in writing of that safeguard, Safeguard No. 7068632 is also facially invalid.

To be valid, a safeguard must identify a hazardous condition and specify a remedy. *See Oak Grove Res., LLC*, 38 FMSHRC 1273, 1278 (June 2016); *see also Am. Coal Co.*, 34 FMSHRC 1963, 1969 (Aug. 2012). The safeguard must articulate the hazard and “conduct required of the operator to remedy such hazard” with specificity. *Oak Grove Res., LLC*, 35 FMSHRC at 2012 (citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (“*SOCCO I*”). Because the Secretary issues safeguards “without resort to the normally required rulemaking process,” it is essential that “a narrow construction of the terms of the safeguard and its intended reach” is employed.⁶ *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808 (Aug. 1998) (quoting *SOCCO I*, 7 FMSHRC at 512 (internal quotation marks omitted)). This is necessary to balance the Secretary’s “unique authority to require a safeguard” and the operator’s right to fair notice of the conduct required under the safeguard. *BethEnergy Mines, Inc.*, 14 FMSHRC at 25. Safeguard No. 7068632 purports to specify the hazard of miners being injured “should any portion of a chain or cable fail,” and the specific remedy that miners “be located in a position so that they will not be injured.” Ex. P-4. However, I find that Safeguard No. 7068632 is facially invalid for three separate reasons.

First, Safeguard No. 7068632 is invalid because the hazard it purports to address—the danger of a chain or cable breaking—is not based on the “consideration of the specific conditions at the particular mine.” *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1607 (Aug. 1994) (citing *SOCCO II*, 14 FMSHRC at 9) (internal quotation marks omitted). “The hazard posed by the use of unsafe equipment,” such as a broken chain or cable, “does not arise from conditions specific to particular mines and thus is not properly addressed by issuance of a safeguard.” *Id.* *But see Oak Grove Res., LLC*, 35 FMSHRC at 2013 (citing *SOCCO II*, 14 FMSHRC at 8) (reiterating that a safeguard is not per se invalid “if it addresses conditions that exist in a significant number of mines” (internal quotation marks omitted)). However, this condition—hoisting men or materials—applies to every mine in the entire country, which is entirely too broad to be the subject of a safeguard. The following exchange between GMS counsel and Inspector Revi at the hearing demonstrates why the hazard that Safeguard No. 7068632 attempts to address is too broad to be covered by a safeguard:

GMS Counsel:	Okay. The condition that is described in the safeguard about using chains or cables to move equipment, does that present a hazard wherever it may be found?
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⁶ The Commission has reaffirmed this principle from *SOCCO I* multiple times. *See Black Beauty Coal Co.*, 38 FMSHRC 1, 2 (Jan. 2016); *see also Oak Grove Res., LLC*, 37 FMSHRC at 2690; *Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781, 1785 (Nov. 1997); *United States Steel Mining Co., Inc.*, 15 FMSHRC 2445, 2447 (Dec. 1993); *Green River Coal Co., Inc.*, 14 FMSHRC 43, 48 (Jan. 1992).

Inspector Revi: If there's stored energy in that cable or chain, yes. Absolutely. Anything that has tension on it, if it breaks, it's going to fly somewhere, but nobody knows where.

GMS Counsel: And that's true at Bailey [Mine]. Right?

Inspector Revi: That's true at any mine or any industry.

GMS Counsel: At any mine anywhere, that's true?

Inspector Revi: What, that this could happen?

GMS Counsel: Yes.

Inspector Revi: Absolutely.

Tr. 45-46.

Second, Safeguard No. 7068632 is invalid because it contains a nonspecific remedy that does not adequately address how the operator must adhere to its mandate. *Cf. Am. Coal Co.*, 34 FMSHRC at 1979 n.5 (finding that a safeguard requiring equipment be mounted “in a manner that provides ‘maximum’ clearance” was insufficiently specific and facially invalid). Inspector Revi’s testimony makes clear that Safeguard No. 7068632 does not provide a specific remedy, as required by law. Although no exact distance was specified in Safeguard No. 7068632, the remedial “safe” distance that miners were to be located should have been greater than the 25 to 30 feet that the injured miner was standing during the 2006 incident. Tr. 45; Ex. P-4. In the instant matter however, the miner that was struck was standing 33 feet away. Tr. 44-45; Ex. P-1. Again, even Inspector Revi testified that he was unsure what distance would have been appropriate under the direction of the safeguard and in fact stated: “I guess with hindsight . . . would 40 feet be far enough? I don’t know.” Tr. 45.

Third, Safeguard No. 7068632 is facially invalid because it never fixed a time for compliance. *Cyprus Emerald Res. Corp.*, 20 FMSHRC at 808 (quoting *SOCCO II*, 14 FMSHRC at 7) (stating that “a safeguard ‘may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required *as of a specified date*’” (emphasis added)); *Jt. Ex. 2*.

Consequently, Safeguard No. 7068632 is facially invalid because it is neither sufficiently specific as to the hazard identified, nor the specific remedy to be undertaken.

C. Whether Safeguard No. 7068632 Is Applicable to GMS on the Instant Facts

Finally, in addition to the conclusions set forth above, the specific hazard envisioned by Safeguard No. 7068632—and mandatory remedial directive—is not applicable to GMS under the factual circumstances described in Citation No. 9074949.

A citation that alleges a violation of a safeguard “should be vacated if the conditions ‘differ fundamentally in nature, cause and remedy’ from those in the underlying safeguard, such that the operator lacked notice that the cited conduct was prohibited.” *Oak Grove Res., LLC*, 38 FMSHRC at 1278 (quoting *BethEnergy Mines, Inc.*, 15 FMSHRC 981, 986 (June 1993)); see also *SOCCO I*, 7 FMSHRC at 512-13. Further, safeguards “must be strictly construed in determining whether a violation has occurred.” *Cyprus Cumberland Res. Corp.*, 19 FMSHRC at 1785 (citing *SOCCO I*, 7 FMSHRC at 512).

Here, the conditions cited in Citation No. 9074949 differ fundamentally from those in Safeguard No. 7068632. The equipment that failed here, a hook and hook clevis, was part of the 20-ton Pettito Mule, not a portion of a separate “chain or cable” that was expressly envisioned by Safeguard No. 7068632. Tr. 8, 34, 42, 44, 53; Exs. P-1, P-4; Jt. Ex. 2. Inspector Revi expressly testified that no chain or cable was used during the August 2018 accident at Bailey Mine. Tr. 44. Further, Inspector Revi testified that the root cause of the hook failure was the deterioration of the mine road where the Pettito Mule was stuck. Tr. 8, 34, 37, 39-40. Nothing in Safeguard No. 7068632 applies in any way to the maintenance of the mine road or to poor road conditions. Finally, the parties stipulated that neither a mantrip nor a hoist was involved in this accident. Jt. Ex. 2. Therefore, even if Safeguard No. 7068632 was otherwise valid and applicable to GMS, the facts do not support a finding that GMS violated Safeguard No. 7068632—if the safeguard is strictly construed.

V. CONCLUSION

In sum, because Safeguard No. 7068632 (1) is facially invalid, (2) differs fundamentally from the instant circumstances, and (3) is unenforceable against GMS, Citation No. 9074949 must be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 9074949 is **VACATED**. Accordingly, these proceedings are **DISMISSED**.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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/smp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2020

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2020-0004
A.C. No. 46-09091-499508

v.

MARFORK COAL COMPANY, LLC,
Respondent

Mine: Horse Creek Eagle

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement proposing a reduction in the penalties from \$29,612.00 to \$24,842.00. Citation No. 9162703 remains unchanged, but the CLR justifies the reduction in penalty by stating there is a legitimate factual and legal dispute regarding gravity and negligence. The CLR has stated that Citation No. 9243753 has been vacated. The Secretary claims the unreviewable discretion to vacate a citation under *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The CLR also requests that Citation No. 9167505 be modified to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

Pursuant to 29 C.F.R. § 2700.1(f) and Federal Rule of Civil Procedure 12(f), the undersigned strikes paragraph 3(B) from the Secretary's Motion. This paragraph states definitively that the Secretary's discretion to vacate a citation at any time—including after the proposed penalty has been contested—is unreviewable. However, section 110(k) requires that *any* contested penalty cannot be compromised, mitigated, or settled without the approval of the Commission.

In *RBK Construction*, the Commission relied on the Supreme Court's ruling in *Cuyahoga Valley Ry. Co. v. United Transport Union*, 474 U.S. 3, 7-8 (1985), and ruled that the Secretary has the unreviewable discretion to vacate citations. However, *Cuyahoga Valley* concerns the Occupation and Safety Health Act, a law that lacks any requirements similar to those in section 110(k). *See generally* 29 U.S.C. § 651 *et seq.* Furthermore, although the Commission in *RBK Construction* summarized the Secretary's argument that section 110(k) only applies to settlements of penalties and not to vacations of citations or orders, the Commission never addressed that argument or provided any basis for a ruling that the reduction of a contested proposed penalty to zero does not qualify as compromising, mitigating, or settling a contested proposed penalty under section 110(k).

Additionally, the Commission did not explain in *RBK Construction* how—if the Secretary has the unreviewable discretion to eliminate proposed penalties through vacating citations and orders—the Commission can uphold the intent of Congress that section 110(k) act to “assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided” and “that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties.” *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) (quoting *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978)) (emphasis removed). It would appear that the unreviewable discretion to eliminate citations, orders, and entire proposed penalties holds the potential to hide the very abuses Congress intended the Mine Act to address.

Given the requirements in section 110(k) and the fact that the Commission did not fully address them in *RBK Construction*, the undersigned considers this case law questionable and will not rely on it to evaluate this Motion.

Nonetheless, the undersigned considered the enforcement value of the settlement as a whole when evaluating the Secretary's vacation of Citation No. 9243753.

The undersigned considered, absent the paragraph struck above, the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC at 1976, and is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9162702	\$2,172.00	\$2,172.00
9162703	\$4,464.00	\$2,665.00
9162704	\$2,172.00	\$2,172.00
9161855	\$604.00	\$604.00
9161861	\$977.00	\$977.00
9167495	\$3,241.00	\$3,241.00
9161869	\$1,577.00	\$1,577.00
9167500	\$3,511.00	\$3,511.00
9167501	\$3,511.00	\$3,511.00
9167502	\$1,852.00	\$1,852.00
9161874	\$1,852.00	\$1,852.00
9243753	\$168.00	\$0.00
9167505	\$3,511.00	\$708.00
	<u>\$29,612.00</u>	<u>\$24,842.00</u>

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9167505 be **MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is further **ORDERED** that the operator pay a total penalty of \$24,842.00 within thirty days of this order.¹

/s/ Thomas P. McCarthy
 Thomas P. McCarthy
 Administrative Law Judge

¹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

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U.S. Department of Labor
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/ztb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 21, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

RAIN FOR RENT,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2016-0730
A.C. No. 04-01891-418057

Mine: Eliot Plant

DECISION AND ORDER

Appearances: Andrew R. Tardiff, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner

Bryon J. Walker, Esq., Rose Law Firm, Little Rock, Arkansas, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d).¹ At issue are two citations issued to Respondent Western Oilfields Supply Company, doing business as Rain for Rent (“RFR”), under Section 104(a) of the Mine Act.

A hearing was held in San Jose, California on November 26, 2019, at which time testimony was taken and documentary evidence was submitted. The parties filed post-hearing briefs on January 28, 2020. I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. After consideration of the

¹ This case was previously before the Commission. *Rain for Rent*, 40 FMSHRC 976 (July 2018), *aff’g* 39 FMSHRC 1448 (ALJ 2017). The United States Court of Appeals for the District of Columbia Circuit remanded this case in light of the Supreme Court’s decision in *Lucia v. SEC*, 138 U.S. 2044 (2018). *See W. Oilfields Supply Co. v. FMSHRC*, No. 18-1269 (D.C. Cir. Mar. 22, 2019). The Commission subsequently remanded this case to the undersigned for a hearing and decision on the merits. 41 FMSHRC 243 (May 2019).

evidence and observation of the witnesses and assessment of their credibility, I uphold the Section 104(a) citations as written for the reasons set forth below.

B. Stipulations

The parties have stipulated to the following facts:

1. RFR provides temporary liquid handling solutions, including pumps, tanks, filtration, and spill containment to different industries, including mine operators in the United States, Canada, and the United Kingdom.
2. On the date of the subject citations, RFR provided services as an independent contractor to CEMEX Construction Materials Pacific LLC, which operates the Eliot Plant, Mine Safety and Health Administration (“MSHA”) I.D. No. 04-01891, in Alameda County, California.
3. The case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (“FMSHRC”) and the assigned Administrative Law Judge (“ALJ”).
4. The MSHA inspector was acting in his official capacity when issuing the citations.
5. The citations were properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.
6. RFR had no history of MSHA violations as of the date the citations were issued.
7. The air compressor referenced in Citation No. 8785486 was a Quincy model, with a 30 gallon air receiver tank, which was mounted on the Ford F-550 company service truck (company # 2102).
8. During the subject inspection, RFR did not produce to the MSHA inspector, in response to the MSHA inspector’s request, any documents showing that the air compressor referenced in Citation No. 8785486 had been inspected by an inspector holding a valid National Board of Boiler and Pressure Vessel Inspectors (“National Board” or “Board”) Commission and in accordance with the applicable chapters of the National Board Inspection Code (“NBIC”).
9. 30 C.F.R. § 56.4402 does not require any specific labeling on a safety can, other than that the labeling “indicate the contents.”
10. MSHA has neither published any guidance, nor promulgated any rules or regulations that defined “labeled” or “indicate,” as those terms are used in 30 C.F.R. § 56.4402.
11. There is no requirement under the Mine Act that labeling of a safety can be in a specific location on the can, in a specific size or color, or be in a specific language.

12. The safety can which is the basis for Citation No. 8785487 was red in color at the time of the subject inspection.
13. RFR and its representatives have at all times cooperated with the investigation.
14. RFR demonstrated good faith in addressing the conditions in the subject citations.
15. The alleged violation in Citation No. 8785487 was terminated immediately.
16. The alleged violation in Citation No. 8785486 has been terminated.

Jt. Ex. 1.²

II. BACKGROUND

Rain for Rent is a global contractor supplying liquid handling solutions to various industries. It was providing services on the Eliot Mine sand and gravel mine property on July 6, 2016 when MSHA inspector Nicholas R. Basich³ conducted a regular inspection. He issued the two citations herein. Tr. 15; Ex. S-3; Jt. Ex. 1.

During the inspection of RFR's Ford F-550 truck, Inspector Basich observed a Quincy air compressor and 30-gallon air receiver tank in the bed of the truck. Tr. 15-16; Ex. S-3, S-5 at 3; Jt. Ex. 1. Basich looked for evidence that the receiver tank was inspected, and noted that it displayed no evidence that an inspector commissioned by the National Board performed an inspection. Tr. 15-16, 26. Basich then asked the driver of the RFR truck to produce evidence that the tank had been inspected by a National Board-commissioned inspector. Tr. 15, 17, 18, 43. After searching the truck, the RFR driver informed Basich that he did not have a permit or other proof of a conforming inspection. The RFR driver also telephoned the RFR office but was still unable to produce the documentation at which time Basich issued Citation No. 8785486. Tr. 18.

Next, Inspector Basich observed two Eagle Manufacturing Company 5-gallon safety cans in the cargo bed of the truck. Tr. 29, 30. The safety cans were identical in design, with each being red in color and having a yellow stripe running horizontally around the upper portion of the cans. Tr. 31, 60; Ex. S-7; Jt. Ex. 1. However, the exterior of one safety can was labeled with the word "diesel," whereas the other safety can did not have any similar writing. Tr. 29, 59. After the RFR driver stated that the safety can without writing held gasoline, Basich issued Citation

² In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered Ex. S-2 to S-7. The Respondent's exhibits are numbered Ex. R-1 to R-12. The stipulations are the only joint exhibit, Jt. Ex. 1. References to the Secretary's Post-Hearing Brief are designated "SB," and references to the Respondent's Post-Hearing Brief are designated "RB."

³ Basich has served as a mine safety and health inspector with MSHA for seven years. Tr. 9, 10. Prior to becoming a mine inspector, Basich was employed in the construction industry, where he held supervisory positions. Tr. 10, 11. Basich attended the Mine Safety and Health Academy, and has specifically received training on pressure vessels and fire prevention. Tr. 12.

No. 8785487. Tr. 29; Ex. S-6, S-7. Shortly thereafter, the RFR driver wrote the word “gasoline” on the safety can and terminated the citation. Tr. 31, 32; Jt. Ex. 1.

III. LEGAL PRINCIPLES

A. Gravity

Gravity is the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000) (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996)). The Commission has indicated that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the [significant and substantial] inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation*, 18 FMSHRC at 1550; see also *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation demonstrating recidivism, or a violation that could compound the effects of other conditions).

B. Negligence

Negligence is conduct that falls below the high standard of care established by the Mine Act. 30 C.F.R. § 100.3(d). Operators must avoid conditions and practices that could cause injuries. *Id.* Negligence considers what actions a reasonably prudent person—familiar with the mining industry, the facts, and the protective purpose of the cited regulation—would have taken. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016) (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). An ALJ may “evaluate negligence from the starting point of a traditional negligence analysis” rather than consulting the Secretary’s definitions. *Brody Mining, LLC*, 37 FMSHRC at 1702.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8785486 in violation of 30 C.F.R. §56.13015

1. Fact of Violation

The condition or practice cited by Basich was that the 30-gallon pressure air receiver tank located in the bed of the mechanic’s Ford F-550 truck did not have a current record of inspection. Ex. S-2. The Secretary assessed the violation as unlikely to cause injury, but of a fatal nature to one miner and the result of moderate negligence. The proposed penalty is \$114.00.

The mandatory standard requires that compressed air receivers and other pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code (“NBIC”). Records of the inspections shall be kept in accordance with the NBIC and shall be made available to the Secretary or his authorized representative. 30 C.F.R. §56.13015 (a) and (b).

The applicable Chapter II of the NBIC requires that “inspections of ... pressure vessels as provided for in jurisdictional regulations, will be made at the time of installation and at regular

intervals thereafter.” R-10 at 5. The purpose of the NBIC is “to maintain the integrity of such ... vessels after they have been placed into service...by providing rules and guidelines for inspection after installation....thereby helping to ensure that these objects may continue to be safe.” Ex. R-10 at 5.

2. Findings of Fact and Analysis

Basich testified that regular inspections of a pressurized tank once it has left the manufacturer is critical. Tanks are handled multiple times thereafter in shipment, installation and pressurization. Such handling can cause fractures in the tank that are invisible to the naked eye yet serious enough to turn the tank into a “bomb” when pressurized during normal use. Shrapnel from the tank could easily cause fatal injuries should a miner be exposed to such an event. National Board inspectors perform tests that measure the thickness of the tank wall and inspect for any cracks, scars or other signs of damage using specialized equipment to ensure their continued safety. Once the tank is inspected, it is documented on paper with the name of the certified inspector, name of their company and the date on which the inspection was performed. The record indicates that the RFR tank was installed on the F-550 truck on December 17, 2014, one year and seven months prior to Basich’s inspection. It was then placed into operation at the mine on February 25, 2015, one year and five months prior to the inspection. Kelly George, Vice President of RFR testified that the RFR trucks are driven to multiple work sites across state lines with frequency. Tr. 70. It is therefore evident that any one of these transportation circuits as well as more than one year’s normal use and wear and tear on the tank could cause undetectable damage resulting in a catastrophic injury.

Rain for Rent contests that violation on several bases, essentially arguing that the manufacturer’s plate issued by the American Society of Mechanical Engineers (“ASME”) (which was on the tank) complied with the mandatory standard and that the Secretary’s actions were arbitrary and capricious, and deprived the Respondent of fair notice and due process. None of these arguments are persuasive or relevant.

Respondent cites to Chapter IV of the NBIC in support of its argument that the ASME plate on the tank was in compliance with the cited standard. Chapter IV, however, expressly “limits its application to the inspection during construction of and assembly of new pressure vessels.” Ex. R-10 at 4. Respondent further relies on *D&H Gravel*, 31 FMSHRC 272 (2009)(ALJ) in support of its position that the Secretary’s interpretation of the standard is contrary to Commission precedent. Interestingly, Respondent failed to properly cite the case (or make mention of the fact) in its brief that *D&H Gravel* is an ALJ decision which holds no precedential value. I find, as a matter of law, the decision in that case was a misinterpretation of the mandatory standard and Chapter II of the NBIC.

Not only does RFR cite an inapplicable chapter of the NBIC and a decision of no precedential value, but its position flies directly in the face of the protective purpose of the Mine Act and could certainly not be so interpreted by a reasonable person familiar with the mining industry charged with being aware of the Secretary’s rules and regulations.

Respondent also argues in its brief:

The California permit, like the manufacturer's plate with an ASME certification, does not say "Nationally Board Certified" on its face. The arbitrariness of choosing to accept one and not the other is egregious in light of the fact the California permit does not even represent an inspection by an individual holding a National Board Certification. See Cal. Code Regs. tit. 8, § 779. Issuing a citation without considering the manufacturer's inspection plate with the ASME stamp, which FMSHRC precedent expressly finds is sufficient, shows that the action was arbitrary and capricious. See D&H Gravel, 31 FMSHRC at 280.

RFR brief at 12. While difficult to make out the logic of the argument, it is clear that it is misplaced. As found above, the SOL has not accepted the ASME stamp or the CA permit as evidence of compliance with the cited standard, nor have I. Again, reliance on D&H Gravel is misplaced. There is no "FMSHRC precedence" that finds the ASME stamp sufficient. RFR further contends that Inspector Basich issued his citation for the operator's failure to comply with California law depriving it of fair notice. This is not the case. Basich found a violation of the unambiguous cited mandatory standard when he found no Commission-certified inspection on the tank or documentary evidence of the same. He did not apply California Law. Rain for Rent's due process argument is based, again, on D&H Gravel and is therefore, again, misplaced and irrelevant.

I hold that the SOL has proven by a preponderance of the evidence that a person with a valid National Board Commission did not inspect the tank within the plain and unambiguous language of 30 C.F.R. §56.13015(a). The standard provided the operator with adequate notice that such an inspection was required. I also find RFR failed to provide the Secretary through its authorized MSHA inspector documentary proof the required inspection in violation of 30 C.F.R. §56.13015(b).

3. Negligence and Gravity

Basich testified that he assessed the negligence as moderate because it was an open and obvious condition that RFR should have been aware of. Vice President Kelly George, who holds degrees in occupational safety and health and jurisprudence, testified that he was aware that California air tank inspectors were not required to be commissioned by the National Board and he could not ensure that RFR tanks were inspected by commissioned inspectors. I find moderate negligence is appropriate, although only just. I find the violation is reasonably serious and could have resulted in a fatal injury to one person should the unlikely event of a tank explosion occur.

B. Citation No. 8785487 in violation of 30 C.F.R. §56.4402

1. Facts of Violation

The condition or practice Basich cited during his July inspection was that one of two 5 gallon safety cans located in the bed of the Ford F-550 truck was not labeled to indicate its contents. It was full of gasoline according to the truck driver. It is assessed as unlikely to cause

and accident or injury resulting in lost workdays or restricted duty affecting one miner and the result of moderate negligence. Ex. S-6. The Secretary has proposed a civil penalty of \$114.00.

The cited mandatory standard requires “[s]mall cans of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents. 30 C.F.R. §56.4402.

Basich testified that he found the cited red can was not labeled to indicate its contents. “So you couldn’t tell looking at the outside of the can what was inside the can.” Tr. 29; Ex. S-7. The can is visibly old, dented and scratched. A similar red can was found as well which had a label on it indicating that it contained diesel fuel. Tr. 59. Basich was concerned with the failure to label the can as misuse of it could lead to a fire. Tr. 14. At the time he issued the violation, it was late in the day towards the end of the shift and the gas can was full. Tr. 64.

B. Findings of Fact and Analysis

The Secretary asserts that the meaning of “contents” in this context means the name of the actual substance within the can. The Respondent, to simplify its myriad of arguments, urges that the color of the can, the printed warnings such as “flammable, explosive, and dangerous” and the like satisfy the language of the standard.

I agree with the Secretary’s interpretation of this clearly worded standard. The word “contents” as Inspector Basich indicted, answers the question, “What’s inside?” The response is a thing -a noun, not an adjective describing the properties of what may be inside the can if it is filled with the intended contents – gasoline. That the red color of the can indicates the can should be filled with gasoline, in contrast to a yellow can which is suggested for diesel fuel, as RFR argues, is irrelevant. Nothing in the manufacturer’s literature or the National Fire Protection Code provisions submitted by RFR in support of the assertion that the red can is a sufficient indication of the contents therein, rules out the use of a red can for other substances. RFR also points to MSHA Hazardous Communication (“HazCom”) and OSHA standards as well as the MSHA Program Policy Letter (“PPL”) No. P13-IV-01 as proof that the cited can satisfies the requirements of §56.4402. Aside from being under entirely different sections of C.F.R. from what was cited here, the hazcom provisions offer no support of RFR’s position. The PPL requires a container to be labeled to include “the chemical identity” in addition to the appropriate warnings (flammable, toxic, explosive, etc.). Ex. R-4. Additionally, the PPL also states that OSHA requires labels to include the product identifier and chemical identity and have a Material Safety Data Sheets (“MSDS”) on hand to cross-reference for each hazardous chemical used at the mine. The significance of this is, an MSDS cannot be cross-referenced to “flammable” or any other adjective describing the property of a particular chemical without the specific identification of the chemical in question.

Respondent once again misguidedly cites *Bellaire Corporation*, 12 FMSHRC 1726 (1990)(ALJ) as precedence for finding the red can was sufficiently labeled. Again, RFR fails to properly cite or refer to the case as an ALJ decision, not Commission precedent. Furthermore, the issue in *Bellaire* was entirely different from the instant case. In fact, the Administrative Law Judge stated, “[t]he issue is whether the cans containing gasoline were properly ‘identified.’ The

cited safety standard expressly requires only ‘proper identification,’ not ‘proper labeling.’” *Bellaire* at 1730.

The language of the standard in question is unambiguous. Any reasonable person familiar with the mining industry would know that a “label indicating contents” means what the particular substance is inside the can. I find the Secretary has met his burden of proving this violation.

C. Negligence and Gravity

I find the violation to be reasonably serious. Should the can be improperly handled, it could lead to serious burns to the driver of the truck. I agree with Basich that it would be unlikely.

I find the negligence is properly assessed at moderate. The driver of the truck knew the can contained gasoline as opposed to the other red can containing diesel – a nonflammable fuel. However, the can was still full at the end of the shift and he was not the only miner with access to the can. Having both red cans containing different substances on hand could easily lead an inattentive miner to confuse the two and mishandle or misuse it resulting in injuries.

V. PENALTIES

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided for by the Act. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012) (citing 30 U.S.C. § 820(i)). In determining penalty amounts, Section 110(i) directs the Commission to consider:

[T]he operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA’s Part 100 regulations, although ALJ penalty assessments “must reflect proper consideration” of the Section 110(i) criteria. *Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016) (citations omitted). In addition to considering the Section 110(i) criteria, the judge must provide a factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 265-66 (May 2006) (citing *Sellersburg*, 5 FMSHRC 287, 292-93 (Mar. 1983)). My analysis of the Section 110(i) factors is set forth below.

The parties have stipulated that RFR had no history of violations at the time these citations were issued and that the violations were abated in good faith. There is no evidence of

record of the operator's inability to pay the proposed assessments and find that it is a large, global company and therefore find the penalties will not affect the operator's ability to continue in business. The findings as to gravity and negligence involved in each citation are set forth above.

After considering the six statutory penalty criteria, I assess a penalty of \$114.00 for Citation No. 8785486 and \$114.00 for Citation No. 8785487.

ORDER

Rain for Rent is hereby **ORDERED** to pay a total penalty of \$228.00 for the violations herein within thirty (30) days of the date of this Decision and Order.⁴

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

Andrew Tardiff, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202

Byron Walker, Rose Law Firm, 120 East Fourth Street, Little Rock, AR 72201

⁴ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 24, 2020

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

BOART LONGYEAR COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2019-0297-M
A.C. No. 26-02512-485389 Y12

Leeville Mine

DECISION

Appearances: Luis Garcia, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California for Petitioner;
Dana M. Svendsen, Esq., Sherman & Howard L.L.C., Denver, Colorado for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Boart Longyear Company (“Boart”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Elko, Nevada, and filed post-hearing briefs. Two section 104(a) citations and one section 104(g)(1) order, with a total proposed penalty of \$82,886.00, were adjudicated at the hearing.¹ Boart was a contractor working at the Leeville Mine, an underground gold mine in Eureka County, Nevada. For reasons set forth below, I vacate Citation No. 9379548 and Order No. 9379555 and modify Citation No. 9379549. Although I have not included a detailed summary of all evidence or each argument

¹ The three enforcement actions in this proceeding were issued along with imminent danger Order No. 9379547, which Boart neglected to contest. The imminent danger order is not before me. *See Sims Crane Inc.*, 39 FMSHRC 1367 (July 2017); *see also ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). During a conference call with the parties prior to hearing I made clear that I would not allow the Secretary to rely upon the language in the Condition or Practice section of the 107(a) order to establish the underlying facts in this case. *See Knife River Const.*, 38 FMSHRC 1289, 1294 (June 2016) (Contrasting 107(a) imminent danger orders, which are reviewed from the perspective of an objectively reasonable inspector, with violations of mandatory safety standards, which the Secretary must prove by a preponderance of the evidence). During this call, I advised counsel for the Secretary that he would be required to establish the alleged violations by a preponderance of the evidence presented at the hearing.

raised, I have fully considered all of the evidence and arguments. Further, my findings and conclusions are restricted to the particular facts of this case.

The Secretary bears the burden of proving a violation by a “preponderance of the evidence.” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). In order to satisfy his burden the Secretary must convince the court that the existence of a fact is more probable than not. *Id.* “If the Secretary fails to meet this burden then there is no violation, irrespective of any counterarguments.” *Sims Crane*, 41 FMSHRC 393, 396 (July 2019).

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 14, 2019, Juan Sarabia,² a floor mechanic for Boart, was tasked with traveling from Boart’s Salt Lake City shop to the Leeville Mine, an underground gold mine operated by Newmont Gold, to replace a transfer case in a pump rig. Tr. 311, 318. Sarabia loaded the oil-filled replacement transfer case³ into his vehicle and traveled to the mine. Tr. 179, 319, 381.

Upon arrival at the mine around noon, Sarabia, along with other Boart crew members, gathered in the “doghouse”⁴ to prepare the Job Hazard Analysis whiteboard (“JHA board” or “the board”) for the task of changing out the transfer case. Sec’y Ex. 18; Tr. 132, 178, 315, 318-319, 410. Preparing the JHA board involved the entire crew discussing and documenting on the board the hazards and risks associated with the task of replacing the transfer case and how they planned to mitigate against such. Tr. 162, 163, 165, 315, 317, 370-371, 408-409, 429. The group

² Sarabia has worked for Boart for approximately eight years, including a period where he worked in oilfields and routinely dealt with suspended loads and taglines. Tr. 311, 368-370. Prior to becoming a mechanic he worked as a floor helper, mast and derrick hand, and safety man. Tr. 364, 369. As a safety man he was responsible for providing hazard training to others. Tr. 369. While he normally worked at Boart’s Salt Lake City shop, he routinely traveled to mine sites to work on equipment. Tr. 366. He has taken apart and assembled many pieces and parts of equipment, including transfer cases on pump rigs. Tr. 365. He operated a forklift daily when working on drilling and pump rigs. Tr. 365-367.

³ Oil was used to lubricate the interior of the case and prevent moisture from causing rust. Tr. 179, 381.

⁴ The “doghouse” was a walk-in trailer located next to the subject pump rig. Tr. 161-163.

covered suspended loads and the use of taglines, as indicated by the text on the board.⁵ Sec’y Ex. 18; Tr. 164, 371, 372, 408, 424. Boart has a JHA board for every mine site job and the crew always completes the board before beginning a job and revisits the board each morning during a job. Tr. 165, 372, 408-409, 447-448. After completing the board that morning, the crew moved the replacement transfer case from Sarabia’s truck to an area behind the pump rig and then removed the old transfer case from the rig before retiring for the evening.⁶ Tr. 178, 316, 322, 361.

Sarabia arrived at the mine the following morning, January 15, around 7:00 AM. Tr. 323. Like the day before, he and the other Boart crew members gathered in the doghouse to review the board and discuss hazards involved with installing the replacement transfer case. Tr. 179, 323, 380, 381, 429. After reviewing the board, the crew threw salt around the worksite because snow had fallen overnight and accumulated on the ground and equipment. Tr. 324, 360, 401. Sarabia testified that there was snow on the forks of the forklift that morning. Tr. 360. The crew then went about their various tasks for the day.

Sarabia’s task included removing multiple fittings from the replacement transfer case in order to fit the case into the pump rig. Tr. 382, 391. Given the weight of the case, approximately 500 pounds, Sarabia was concerned that moving the case while it was on the ground would expose persons to pinch point hazards. Tr. 383. As a result, he planned to use a forklift to suspend the case above the ground so he could position the case to remove the fittings before draining the oil. Tr. 382, 391, 392.

Sarabia, along with other crew members, rigged nylon straps to the replacement transfer case. Tr. 361, 366. After rigging the case and moving the forklift into position, the crew attached the other end of the rigging straps to the left fork of the lift.⁷ Tr. 326, 345, 361, 362, 404. According to Sarabia, he chose to suspend the case from the left fork because it allowed him to

⁵ Sarabia and Edwin Spear, an Environment Health and Safety (“EHS”) advisor with Boart, both testified that they would expect to see a JHA board at every Boart worksite. Tr. 216, 295, 375. Jory Shumway, the field supervisor in charge of this particular job, testified that, although he did not have a specific recollection of the board on January 14, he would expect that taglines and suspended loads were covered and documented since they are usually on the board every day. Tr. 113-114, 131-132, 313. Abe Hess, a Boart rig operator, testified that he filled out parts of the board. Tr. 424. During Hess’s testimony he initially appeared to be under the impression that Boart began site setup on January 13. Tr. 423-425. However, his later testimony made clear that his references to January 13 were in error and he should have been referencing January 14 instead. Tr. 426.

⁶ Sarabia testified that he used a used a tagline during the removal of the old case. Tr. 338.

⁷ For purposes of the decision, references to the right and left fork, or right and left side of the forklift, are made from the perspective of an individual sitting in the forklift operator’s cab. The forklift at issue, a JLG Telehandler, was an extended boom forklift. The operator’s cab was located on the left, while the boom was to the right of the operator cab. Sec’y Ex. 9; Tr. 183, 184. Given the position of the cab, the operator had a better view of the left fork. Tr. 184-185.

be in the best position to have face to face communication with the fork lift operator and also be able to see whether the lift operator's hands were off the lift controls.⁸ Boart Ex. B p. 3, 4; Tr. 392, 404. At that point, only Sarabia and Juan Ortega, the lift operator, were working on the task. Tr. 116, 313. Sarabia discussed with Ortega the hand signals he planned to use while moving the case and how the two of them needed to be able to maintain eye contact.⁹ Tr. 383-384.

Ortega raised the forks, thereby lifting the rigging and transfer case off the ground. Tr. 327, 399. After picking up the case, which was behind the pump rig, Ortega drove the lift around a series of barricades to the side of the rig.¹⁰ Tr. 361, 409. Sarabia used an attached tagline to prevent the case from rocking back and forth while it was being moved. Tr. 362. After moving the case into position, Ortega showed Sarabia that his hands were no longer on the lift controls, indicating that Sarabia could go to work.¹¹ Tr. 281, 384, 388. The forklift was parked, the tagline was removed, the lift's outriggers were dropped to the ground, and the transfer case was lifted approximately two to three feet off the ground, i.e., roughly knee height according to Sarabia, above a bucket that would catch oil released during the task.¹² Tr. 141-142, 188-189, 327, 328,

⁸ Sarabia explained that he always suspends machinery from the left fork because using the right fork required the presence of another person to act as a spotter. Tr. 404.

⁹ Boart employees use hand signals to communicate with equipment operators. Tr. 181. Employees are instructed on the hand signals "as soon as they come into the field." Tr. 181.

¹⁰ Abe Hess, a Boart pump rig operator, testified that barricades, or barriers, surrounded the whole worksite as depicted by yellow blocks in Boart Ex. A p. 4; Tr. 407, 409-410. Spear testified that the concrete barriers, which were "Jersey" freeway barriers, were approximately three feet high and were positioned all the way around the pump rig and doghouse, with a small opening for the forklift to get in and out. Tr. 231-233. Spear also used a green pen to identify on Sec'y Ex. 3A the approximate location of the barriers but the markings are difficult to see because the Secretary laminated the exhibit. Tr. 232-233, 266. He noted that the barriers on the aerial photos were not in those positions on January 15 but were located as shown in Boart Ex. A p. 4; Tr. 267. He further testified that anyone beyond the barriers looking at the pump rig and forklift may have had their view obstructed. Tr. 233. Shumway testified that the markings on Boart Ex. A p. 4 accurately depicted the location of the pump rig, doghouse, forklift, and barricades on January 15. Tr. 171, 175.

¹¹ Boart's "Show Hands Policy," required equipment operators to show others that their hands were not on the equipment controls, thereby indicating it was safe for those around the equipment. Tr. 182, 384.

¹² Shumway and Sarabia testified that the best location for the transfer case during this task was just above the bucket on the ground. Tr. 188-189, 389. If the transfer case was above a mechanic's head, the mechanic would not be able to reach the fittings or have leverage to manipulate tools needed during the task. Tr. 186, 188. Further, oil would pour onto the ground and the mechanic if the plug was opened while the case was that high. Tr. 186. Sarabia, who is approximately 5 feet, 4 inches tall, testified that if the case had been above his head he would not have been able to use the tools necessary to complete the task. Tr. 388.

333, 338, 353-355, 362, 385, 388, 395, 400, 403. The forklift was powered off. Tr. 384-385, 387-88, 395, 400.

Sarabia, who was standing on the left side of the forks so that he could maintain eye contact with Ortega in the cab, placed his left hand on the transfer case to prevent it from moving and began the process of removing the fittings, which required the use of a pipe wrench in his right hand. Tr. 282, 327, 329, 332, 344, 345, 355, 386, 390-391, 403. Boart introduced the photographs in Boart Ex. B, which were taken in its Salt Lake City shop, to illustrate the position of Sarabia's body as he was preparing to remove the fittings. Shortly after beginning that task, but before draining any oil, Sarabia heard someone yell "[y]ou stop working, you're dangerous, you can die." Tr. 326, 332, 395, 402. Sarabia immediately stopped what he was doing and walked over to the individual who was yelling at him.¹³ Tr. 329, 348, 403. The individual, MSHA Inspector Amanda Gonzalez,¹⁴ asked Sarabia to get his supervisor. Tr. 329-330.

Gonzalez's recollection is substantially different. She testified that she traveled to the Leeville Mine on January 15 to conduct an EO1 underground inspection. Tr. 20. She initially drove to the mine's safety administration office (the "safety office"), went in, and told a member of Newmont's safety department that she was there to conduct health sampling and finish an underground inspection. Tr. 20. After attaching sampling pumps to some of the miners, Gonzalez exited the safety office and walked 30 feet to her vehicle to put back items that she did not need to take underground. Tr. 20-21, 95.

According to Gonzalez, while walking back toward the safety office from her vehicle she noticed Sarabia standing underneath the right fork of the forklift.¹⁵ Tr. 23-25, 74. Gonzalez testified that, although barriers were in the area, she had a clear line of sight and saw Sarabia using his right hand to guide the transfer case hanging from a tow strap attached to the middle of the right fork above. Tr. 23-27, 74, 84, 462-464. According to Gonzalez, the case was initially at about the middle of Sarabia's body¹⁶ and was being raised into the air by Ortega, who was in the cab operating the forklift. Tr. 24-26, 86. Once stopped, the fork from which the case was suspended was approximately 12 feet off the ground, while the bottom of the transfer case was approximately 6 feet off the ground, i.e., at approximately Sarabia's eye level. Tr. 25, 26, 83-84. Gonzalez stated that Sarabia was facing away from the forklift operator, there was no eye contact

¹³ Sarabia testified that Gonzalez was approximately 15 to 20 feet away from him when he first heard her yell and that he ultimately walked 10 to 15 feet to meet her. Tr. 329, 387.

¹⁴ Gonzalez has been an inspector with MSHA for four years. Tr. 14. Prior to working for MSHA she spent 10 years as a heavy equipment operator at an open pit mine. Tr. 73.

¹⁵ Gonzalez estimated that when she first saw Sarabia under the fork she was approximately 10 feet from her vehicle on her way back toward the safety office and Sarabia was approximately 10 feet to her right. Sec'y Ex. 3A; Tr. 30.

¹⁶ Gonzalez testified that she is five feet, six inches tall and that Sarabia is approximately six feet tall. Tr. 84. Sarabia testified that he is approximately five feet, three to four inches. Tr. 388.

between the two, and hand signals were not being given. Tr. 27. She saw no taglines in the area and she did not see a bucket underneath the transfer case. Tr. 27.

Gonzalez testified that only a “split second” elapsed between the time she saw the situation and when she yelled to Sarabia to get his attention and called him over. Tr. 28, 83. When Sarabia was next to Gonzalez she told him that she was issuing an imminent danger order because he was standing underneath the forklift guiding the transfer case while the lift operator was in the cab operating the machine. Tr. 29. According to Gonzalez, Sarabia told her that he had been in the process of taking off fittings and draining water from the case when she yelled. Tr. 75-76, 88.

Abe Hess, the Boart pump rig operator, testified that he walked up to Gonzalez at the same time Sarabia did and Gonzalez told him to go get their supervisor, Jory Shumway, who was in his truck. Tr. 120, 139, 140, 191, 281, 329-331, 333, 395, 407. According to Sarabia, it was somewhat noisy due to all of the traffic in the area, but neither the pump rig nor the forklift were running. Tr. 333. Boart’s witnesses testified that Shumway and Hess joined Gonzalez and Sarabia as the group moved toward the safety office.¹⁷ Tr. 121-124, 154, 191-192, 331, 334, 411-412.

Gonzalez again offered a substantially different, and somewhat confusing, account of these events. She first testified that she walked alone with Sarabia to the safety office. Tr. 29. She then agreed that she met Shumway and Sarabia in the middle of the office parking lot, but then stated that once inside the safety office she told Jason Haynes, a Newmont safety officer, that he needed to go get Shumway. Tr. 30. She testified that she did not speak with Abe Hess that day. Tr. 463.

According to Gonzalez, between the time when Haynes left the office to get Shumway and when Shumway arrived, she had a five minute conversation with Sarabia during which she discussed the need to use a tagline and avoid standing under the forks of a forklift, especially while the lift operator is in the cab. Tr. 30-31. Gonzalez testified that when Shumway arrived at the office she told him that she was issuing a 107(a) imminent danger order and discussed the citations she was going to issue in conjunction with the order. Tr. 31. Gonzalez claims that both Sarabia and Shumway stated that they were not aware of the requirement to stay clear of suspended loads or the need to use a tagline. Tr. 32. She estimated that her conversations with Shumway and Sarabia lasted approximately 10 minutes. Tr. 91.

Gonzalez testified that, after she spoke with Shumway, she took a photograph of the area around the forklift from approximately the same vantage point where she first observed the Sarabia. Sec’y Ex. 5 p. SOL 00022; Tr. 94. She took no measurements as part of her inspection. Tr. 94. After taking the picture, Gonzalez then traveled underground. Gonzalez stated that she

¹⁷ Hess testified that he heard Gonzalez yell at Sarabia and, when he approached Gonzalez she asked for his name and if he was a supervisor before telling him to go get his supervisor. Tr. 415, 418. According to Hess it took him about 15 seconds to get Shumway and for the two of them to return to Gonzalez and Sarabia, at which point the group then headed toward the safety office. Tr. 419.

was “not [at the mine] for Boart Longyear, I was there for Leeville[,]” and testified that she needed to get underground that day to perform health sampling and continue the EO1 inspection. Tr. 33, 91-92.

According to Gonzalez, at no point during her time on the surface the morning of January 15 did anyone from Boart attempt to show her training documents or the JHA board, and she only became aware of the JHA board in the weeks prior to hearing. Tr. 33, 68-71. On cross-examination Gonzalez agreed that an appropriately completed job hazard analysis could be used as a training guide for task training and that once a miner has performed a task it is no longer a new task. Tr. 77-78.

Sarabia disputed that he had any conversation with Gonzalez when they were in the office and both he and Shumway testified that Sarabia was never alone with Gonzalez in the office. Tr. 192-193, 396. Shumway, Sarabia and Hess all testified that Sarabia and Hess had very little, if any, conversation with Gonzalez that morning. Tr. 124-125, 334-336, 414-415, 419. Rather, Shumway was the only individual who spoke at any length with Gonzalez. Tr. 334-336, 419. According to Shumway, he did not protest when Gonzalez said she was issuing the imminent danger order because he did not know the facts and he had been told by his bosses that it was not his job to fight with inspectors to prove a case. Tr. 115, 123, 126, 134, 136, 140-141, 157 192, 196. Further, Shumway stated that once inside the safety office the only thing Gonzalez said to him was that she needed to get with the other MSHA inspectors underground. Tr. 123. Shumway testified that at no time did Gonzalez say anything about Sarabia not using a tagline, his training, or ask that Boart demonstrate safe procedures. Tr. 134-135, 192.

Sarabia estimated Gonzalez spent maybe two to three minutes talking to Shumway. Tr. 336. Shumway testified that the entire conversation lasted less than 30 seconds. Tr. 193. Hess testified that he and Sarabia stood inside an office while Gonzalez and Shumway had only a short discussion before she left. Tr. 419-420.

Following Gonzalez’s departure from the safety office, Shumway, Hess, Sarabia and others, at the request of Newmont safety personnel, filled out a Newmont Job Hazard Analysis form (the “Newmont JHA”) for the task of installing the transfer case. Sec’y Ex. 8; Tr. 56-57, 112, 113, 125-127, 145, 193, 340-341, 421. Although Boart’s employees informed Newmont that there was already a JHA board in the doghouse, Newmont nevertheless asked for Boart to complete Newmont’s JHA form. Tr. 112, 422. According to Shumway, Boart prepared the Newmont JHA form in response to the imminent danger order and because Newmont wanted it filled out. Tr. 114, 125-126. Shumway testified that Sarabia was “upset, physically, visibly shaken” when the group departed the office. Tr. 149.

Later the same day, Edwin Spear, an EHS advisor for Boart, traveled to the mine to talk to the crew. Tr. 279, 145-146. At the time he arrived no paperwork had been issued by MSHA to Boart. Tr. 279. Sarabia, Ortega and Shumway provided written statements regarding the events of that morning.¹⁸ Tr. 137-139, 147, 221-222, 234; Sec’y Exs. 15, 16, 17. At some point Spear

¹⁸ Ortega did not appear at hearing. His witness statement was offered into evidence. Sec’y Ex. 16. Because Ortega did not appear at hearing and could not be cross-examined regarding the statement, I give it no weight.

entered the doghouse, reviewed the JHA board, and discussed it with Shumway. Tr. 236. Shumway told Spear that the entire crew had discussed the JHA board that morning. Tr. 237.

Spear also met with Shumway, Hess and Jason Haynes to discuss the Newmont JHA that had been prepared. Sec'y Ex. 8; Tr. 239. It was Spear's understanding that the Newmont JHA had been prepared in response to the imminent danger order so that work could be resumed. Tr. 240. He did not discuss Boart's JHA board with Haynes at the time. Tr. 240. However, Spear testified that he did have a discussion with Shumway that the Newmont JHA was pretty much the same thing as the Boart JHA board, but with a few more elaborate details. Tr. 240-241.

After Gonzalez completed her health sampling underground she returned to the surface around 6:00 PM and met with Spear and Devon Wood, Boart's pump division regional manager, in the safety office. Tr. 33-34, 217, 241-242. The three of them had a short discussion about the imminent danger order and the safety features of the forklift, including the safety check valve which prevented the lift from falling in the event of hydraulic failure. Tr. 218, 242, 243, 267-268, 282-284, 299. Gonzalez testified that during the conversation she requested that Spear provide training records for Sarabia because she had reason to believe he was not task trained for this particular task. Tr. 34, 35. According to Gonzalez, she specifically requested MSHA form 5000-23 showing that Sarabia had been task trained. Tr. 471-472. Spear testified that Gonzalez did not suggest that she was going to issue a 104(g)(1) order for a lack of task training. Tr. 242.

On the morning of January 16 Spear emailed Gonzalez a portion of the forklift manual that discussed a feature of the lift that locked out the system in the event of a hydraulic or other type of system failure. Sec'y Ex. 9; Tr. 58-59, 243-244. The forklift was equipped with this lock-out system because it was designed to also be used as a man-lift. Gonzalez testified that this feature was not relevant because the forklift operator was in the cab and the lift was in motion at the time she observed the cited conditions. Tr. 59.

Spear testified that the morning of the January 16 was the first time he discussed Sarabia's training with Gonzalez. Tr. 285. Specifically, he testified that Gonzalez wanted him to provide information about how Boart trained its miners on suspended loads and taglines. Tr. 285. According to Spear, he used an iPad to show Gonzalez Boart's annual refresher training slides as well as the field guide that was given to every employee and kept in the doghouse.¹⁹ Boart Ex. L; Sec'y Ex. 10; Tr. 286, 288, 300. After showing her the documents on his iPad Spear sent a second email and attached the annual refresher training slides. Sec'y Ex. 10; Tr. 61, 245, 301. Spear testified that he sent the slides to show her that all Boart personnel were trained on suspended loads and the use of taglines. Tr. 245-246. Spear disputed that Gonzalez asked for any 5000-23 training records at this time and instead asserted that she only asked for information about the programs Boart used to train its employees. Tr. 246-247.

Spear testified that the slides covered working around suspended loads and the use of taglines. Tr. 247-248. During annual refresher training, the photograph on the first slide showing a suspended load with miners holding attached taglines would have been accompanied by a

¹⁹ There is some dispute regarding the timing of certain requests, what was requested, and when those documents were provided. However, given my findings below with regard to Order No. 9379555, I need not resolve those conflicts.

discussion of both suspended loads and taglines. Sec'y Ex. 10 p. SOL 000107; Tr. 247-248. Further, a second slide, which addressed the issue of hazard identification and specifically listed "Gravity or Overhead hazards," also included a photograph of a suspended load with attached taglines and would have been accompanied by a discussion about both topics. Sec'y Ex. 10 p. SOL 000119; Tr. 249-250. Finally, a third slide addressing "gravity" related hazards would have involved a discussion of overhead loads and associated hazards. Sec'y Ex. 10 p. SOL 000146; Tr. 250. Shumway also testified that a discussion accompanied each slide and that more than just the text of the slide was covered. Sec'y Ex. 10 p. SOL 000146; Tr. 166-167, 205-207, 215. Spear testified that Sarabia's 5000-23 forms and sign-in sheets for multiple annual refresher trainings prove that Sarabia was given the training represented in the slides. Boart Ex. R; Tr. 247.

After reviewing the slides sent by Spear, Gonzalez determined that they provided no information about the use of taglines and working around suspended loads. Tr. 61, 468. Gonzalez sent an email response to Spear in which she notified him that she would not accept the slides as evidence of training and informed him that she would be issuing a 104(g)(1) order. Sec'y Ex. 11; Tr. 61, 63. Spear was surprised by the email because he thought the training materials would be sufficient. Tr. 272. In the same email Gonzalez stated that she would lift the withdrawal order once Boart provided the names and 5000-23 forms for each miner who was working on the day in question. Sec'y Ex. 11; Tr. 63, 256.

Spear responded to Gonzalez's email the following morning, January 17, with the names of the Boart employees and stated that he would send the 5000-23 forms shortly. Sec'y Ex. 12; Tr. 64, 259. Later that same day Gonzalez emailed Spear four enforcement actions, including Citation No. 9379548, alleging that a miner was not clear of a suspended load, Citation No. 9379549, alleging that a tagline was not attached to a suspended load that was being guided by a miner and Order No. 9379555, alleging that the subject miner had not been task trained. Sec'y Ex. 13; Tr. 65, 259.

On January 21, after a telephone conversation with Gonzalez, Spear emailed Sarabia's 5000-23 form to her. Sec'y Ex. 14; Tr. 64-66, 259-260. According to Spear, Gonzalez only requested Sarabia's 5000-23 form for the training he received to lift the 104(g) order. Tr. 260.

Bruce Grange, Boart's senior environmental health and safety coordinator, met with Gonzalez at the closeout conference on January 22 and again at Boart's Elko office on January 28. Tr. 434, 436. He testified that during both conversations Gonzalez was unwilling to listen to his arguments about mitigating circumstances. Tr. 436-438, 449-454.

Grange testified that Sarabia had received relevant training multiple times and cited new hire training, crane training, task training, and annual refresher training as examples. Tr. 434, 448. Moreover, OSHA's 10 hour training course covered suspended loads and taglines. Tr. 297-298, 449. Everyone at Boart received OSHA 10 hour training. Tr. 449. Sarabia testified that Boart Ex. V was his OSHA training card indicating that he had successfully completed the OSHA 10 hour training. Tr. 297, 377.

At hearing, Spear and Sarabia offered testimony regarding photographs of the subject area that show the snow on the left fork had been disturbed and/or removed, while snow on the

right fork had remained undisturbed.²⁰ Sec’y Ex. 3 p. 4; Boart Ex. C. p. BOART 000406-000407; Tr. 265, 292-293, 360. Both Spear and Sarabia testified that the disturbed snow on the left fork indicates that the crew had rigged the nylon straps to that fork and not the right fork as Gonzalez had alleged. Tr. 265-266, 360.

A. Credibility Determination and Resolution of Critical Disputes of Fact

Sarabia and Gonzalez, the only two witnesses present at the time Gonzalez observed the allegedly violative conduct, offered substantially different accounts. In reaching my decision in these matters I find it necessary to resolve three critical disputes of fact: (1) whether the forklift was powered on and the transfer case was being lifted at the time in question, (2) the position of the transfer case, and (3) the position of Sarabia relative to the case and forklift.

Based on my observation of the witnesses and my careful evaluation of their respective accounts, I credit Sarabia’s testimony on each of these issues. Specifically, I find that the forklift was not powered on and the transfer case was not moving. I further find that the transfer case was suspended from the left fork at roughly the height of Sarabia’s knee. Finally, I find that Sarabia was not underneath the forks but, rather, was in a position to the left of the case from the perspective of the lift operator, which afforded him the ability to maintain eye contact with the operator.

In reaching these conclusions I rely primarily on Sarabia’s clear and convincing testimony regarding his firsthand knowledge of the situation. Although Sarabia testified that he was a little bit nervous at the hearing, he nevertheless provided testimony that was both internally consistent and consistent with the testimonies of other witnesses regarding the events that occurred after Gonzalez ordered Sarabia away from the forklift. Tr. 364. His detailed recollection of events and calm demeanor helped convince me that his testimony should be credited.

It is important to note that I am not finding that Inspector Gonzalez testified untruthfully. Rather, based upon my observations, I am finding that Sarabia was in the best position to observe what happened and that his recollection was more consistent with other evidence offered. Because the inspector did not walk over to the work area to more closely examine the conditions, she may have misinterpreted what she observed.

Gonzalez’s recollection also appears to be inconsistent with photographic evidence of the scene. At least three separate photos, including the single photo taken by the inspector, show that snow had been removed or disturbed on the left fork, while snow on the right fork appeared undisturbed. Sec’y Ex. 5 p. SOL 00022; Boart Ex. C. p. BOART-000406-000407. Boart argues that the “snow removed from the left forklift tine . . . supports Mr. Sarabia’s testimony that the

²⁰ According to Grange, the pictures contained in Boart Ex. C were sent to him shortly before hearing by a Newmont safety employee who had found them in a folder Newmont kept regarding the inspection. Tr. 441. The Newmont employee told Grange that the pictures were taken the day Boart was ordered to shut down. Tr. 441. According to Grange, Newmont takes pictures of every condition cited at the mine even when the citation is issued to a contractor. Tr. 444.

transfer case was hanging from the left forklift tine” because the rigging straps would have disturbed the snow. Boart Br. 10. The Secretary argues that “[t]here should be no relevancy afforded to” the close-up photograph of the forks offered as Boart Ex. C. p. BOART-000406 and that the photo could have been manipulated after the imminent danger order was issued. Sec’y Br. 17 n. 12. However, the court finds that the photograph taken by the inspector, Sec’y Ex. 5 p. SOL 00022, as well as other photographs taken by Boart and/or Newmont, all show the same condition, i.e., an area on the left fork where the snow had been removed or disturbed with undisturbed snow on the right fork. As a result, I agree with Boart that the photos support Sarabia’s recollection of events.

Although I do not know precisely why Gonzalez’s recollection of events is so different from Sarabia’s, I take note that she wanted to get underground quickly to conduct health sampling. Gonzalez was clearly in a rush. She was responsible for conducting underground health sampling on January 15, but instead found herself dealing with what she determined to be an imminent danger on the surface. I am troubled by the truncated nature of the inspector’s investigation of the physical evidence. Gonzalez conceded that she never spoke to the forklift operator, never went inside the barriers to closely observe the conditions, never took any measurements, never asked Sarabia to demonstrate or discuss safe procedures for completing the task, and only took a single photograph.²¹ Tr. 90, 92, 93, 94. Notably, Inspector Gonzalez did not take a photo after she first met with Sarabia to document the position of the forks and the transfer case but waited until later after the forks were lowered to the ground and the transfer case removed. Moreover, the only photo she did take was shot from roughly the same location where she met Sarabia. She only observed the scene from that vantage point. Tr. 94-95. It appears Gonzalez’s need to get underground may have caused her to conduct a rather cursory investigation of the conditions.

I am required to resolve genuine disputes of fact that are relevant in determining whether there was a violation and, if so, the gravity of the violation and the negligence of the operator. The burden of establishing credible facts to support a violation rests with the Secretary. I have concluded that the Secretary has not met this burden with respect to many issues, as discussed in more detail below.

B. Citation No. 9379548

Citation No. 9379548, issued under section 104(a) of the Mine Act on January 15, 2019, alleges a violation of Section 57.16009 of the Secretary’s safety standards. The Condition or Practice section of the citation states, in pertinent part, as follows:

A mechanic was found standing underneath a suspended load while the forklift operator was located inside the cab raising the transfer case at Pump Rig LX40 in front of the operations dry. The forks were raised approximately 12 feet off the ground and the transfer case was approximately 6 feet off the ground while the mechanic was guiding the load with his hand. In the event the

²¹ All of the photographs of the scene introduced into evidence were taken after the forks had been lowered and transfer case removed from the forklift.

suspended load were to fall to the ground while the mechanic was standing underneath fatal injuries would occur.

Section 57.16009 requires that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 57.16009.

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury could reasonably be expected to be fatal. She further determined that the condition was S&S, affected one person, and was the result of Respondent’s high negligence. The Secretary proposed a penalty of \$33,840.00 for this alleged violation.

Fact of Violation

Neither the body of the citation nor the inspector’s handwritten “Citation/Order Documentation” notes clearly identify what exactly the Secretary considered to be the suspended load at issue in this citation. Sec’y Ex. 5. Although the language of these documents is vague, the Secretary, in his brief, identifies the forks on the forklift as the suspended load.²² The Secretary argues that Boart violated Section 57.16009 because Sarabia was “not clear of the Forklift’s tynes, or outside the limit of its point of suspension[.]”²³ Sec’y Br. 11-12. I find the Secretary did not meet his burden of establishing this alleged violation.²⁴

Section 57.16009 requires that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 57.16009. The Secretary’s regulations do not define “stay clear of” or “suspended load” in the context of section 57.16009. I first address what constitutes a “suspended load.” Although the Commission has not defined the term, it has twice addressed the identically worded standard applicable to surface metal and nonmetal mines, i.e., 30 C.F.R. § 56.16009.

In *Sims Crane*, 40 FMSHRC 301 (Apr. 2018), the Commission affirmed a judge’s decision finding a violation of section 56.16009 where a miner traveled within the fall zone of a “spreader bar” suspended from, and attached to, the hoist hook of a crane via two cables. Similarly, in *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075 (Dec. 2014) the Commission affirmed a judge’s decision upholding a violation where a miner traveled under a piece of a crane that was being lifted into place by a smaller crane. Notably, in both of these cases the “suspended loads” were *hanging* from a point of suspension above.

²² The Secretary states that “the primary issue in this case is whether Mr. Sarabia was ‘clear’ of the suspended load – Forklift’s tynes.” Sec’y Br. 11. He further states that the inspector observed Sarabia “underneath a suspended load, the Forklift’s right tyne[.]” *Id.* at 11-12.

²³ The terms “tyne,” “tine” and “fork” were used interchangeably throughout the hearing and in the parties’ briefs.

²⁴ Boart, in its brief, disputed Gonzalez’s description of the events and argued that Sarabia’s testimony should be credited. I have already addressed the critical disputes of fact above.

While the Commission has not explicitly stated that suspended loads are only those loads hanging from a point of suspension above, it has described section 56.16009 as “the general rule guiding miners’ interactions with objects suspended from cranes[.]” *Sims Crane* at 304. Moreover, judges applying the cited standard have done so in situations involving objects hanging from a point of suspension above.

In *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504, 516 (June 2008) (ALJ), Judge Barbour affirmed a violation of 56.16009 where a “pitman assembly” suspended from a crane swung and struck another individual. Judge Barbour, relying upon the dictionary definition of “suspended” explained as follows:

Section 56.16009 is straightforward. . . . The noun “load” is modified by the adjective “suspended,” and when used as an adjective “suspended” is defined as being “held in suspension.” *Id.* at 2303. Thus, a “suspended load” is a mass or weight supported by something that is being held in suspension. To be held in suspension is to be in the “state of being hung.” *Id.* “Hung” is the past tense of “hang,” which is defined as “to fasten so as to allow free motion within given limits on a point of suspension.” *Id.* at 1029. Thus, I conclude a “suspended load” is a mass or weight fastened to allow free motion within the given limits of its point of suspension or support, and this is the same meaning I would reach if I interpreted the standard by applying “suspend” as a verb instead of “suspended” as an adjective.

In finding that the “pitman assembly” was a suspended load the judge outlined the purpose of the standard as follows:

Hanging loads having free motion can swing within a specific arc or radius. The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius. The logic is simple and irrefutable. When persons are outside the limits of a load's point of suspension, they will not be struck and injured or struck and killed when the load moves freely.

Id. at 517. Judge Miller utilized the same analysis in *CCC Group, Inc.*, 34 FMSHRC 1192, 1196-1198 (May 2012) (ALJ), where she found that beams hung from a crane constituted a suspended load.

Although I am not bound by the decisions of other administrative law judges, I find that the reasoning in *Haines* and *CCC* is sound. In both cases, the judges found that the standard was designed to prevent persons from being struck by loads that were *hung* from a point of suspension above, but were otherwise free to move or swing within a specific arc or radius. Accordingly, I find that to establish that an object is a “suspended load,” the object must be hung from above.

The Secretary's regulations also do not define what “stay clear of” means in the context of the cited standard. In *Dawes Rigging* the Commission explained that “stay[ing] clear . . . requires more than simply staying out from directly underneath a suspended load[,] . . . and [w]hether a person is clear of a suspended load must be determined by considering the particular facts surrounding the violation.” 36 FMSHRC 3075, 3078 (Dec. 2014) (*citing Anaconda Co.*, 3 FMSHRC 299, 301(Feb.1981)). The Commission noted that miners are not “clear” of a load when they are “located in positions in which they [are] in danger from the movement or falling” of the load. *Id.* at 3078. A “case cannot rest on a vague observation that suspended loads move in unpredictable ways.” *Id.*

I find that the Secretary failed to establish by a preponderance of the evidence that the forks were a “suspended load.” I agree with my colleagues that in order to be a *suspended* load, a load must be hanging from a point of suspension above. There is no dispute that the forks were *elevated*. However, the cited standard is not concerned with elevated loads, but rather loads that are *suspended*, i.e., hanging from a point of suspension above. I find that the forks were not a suspended load.

In addition, I credited Sarabia’s testimony that he was not standing under the forks and that the forklift was shut down. Further, because the forklift was equipped with the safety check valve described by Spear and detailed in Sec’y Ex. 9, and Ortega’s hands were not on the controls, there was no possibility of inadvertent movement of the forks.²⁵

Finally, although not explicitly addressed by the parties, I also find that Sarabia’s presence near the transfer case did not amount to a violation of the cited standard. There can be no dispute that the transfer case was a suspended load. It was hanging from the left fork by the rigging. I find that Sarabia was “clear” of the transfer case. Gonzalez conceded that she never observed Sarabia under the transfer case. Tr. 75. Moreover, given the narrow profile of the transfer case, little to no “arc or radius” existed in which a miner could be struck if the case were to rotate. Similarly, because the lift was powered off and the load was not moving, there was no risk of the load swinging and striking a miner. Although there is no dispute that Sarabia had a hand on the case, his hand was located at the top of the case and would not have been

²⁵ In *Sims Crane*, 40 FMSHRC 301 (Apr. 2018), the Commission addressed the relationship between section 56.16009 and 56.14211. The Commission stated that “the general mandate” of section 56.16009 and the “more precise language of section 56.14211” must be “read harmoniously to arrive at a reasonable result[.]” 40 FMSHC at 304. Section 56.14211, in general, prohibits miners from working under raised portions of mobile equipment, or components of the equipment, until the equipment has been blocked or mechanically secured. 30 C.F.R. § 56.14211. MSHA’s Program Policy Manual (“PPM”) states that the standard is designed “to prevent a ‘free and uncontrolled descent’ in the event of a sudden failure of the system holding up the raised component.” IV MSHA, U.S. Dep’t of Labor, Program Policy Manual, Parts 56/57, at 55 (2015). The PPM expressly states that “[h]ydraulic telescoping boom cranes with flow restrictions or check valves in the hydraulic system will prevent a free and uncontrolled descent of the boom and attached work platform.” While the parties did not present this argument, it appears that the Secretary’s own interpretive guidance acknowledges that safety check valves may satisfy blocking requirements.

endangered if the case rotated.²⁶ Boart Ex. B illustrates Sarabia's approximate position relative to the forks and the transfer case at the time the inspector observed him. Consequently, I find that Sarabia was "clear" of the transfer case because he was not in danger from the movement or falling of the load. I have reached this conclusion taking into consideration the work that he needed to perform.

I find that the Secretary failed to meet his burden of proof with respect to this citation. Inspector Gonzalez spent the vast majority of her time talking with officials of Boart outside and then inside the Newmont safety office. She did not walk around the barricades to enter the area where the forklift was parked to get a better perspective of the conditions and she did not take a photo of the conditions when the transfer case was still rigged to the forklift while in a raised position.

Citation No. 9379548 is **VACATED**.

C. Citation No. 9379549

Citation No. 9379549, issued under section 104(a) of the Mine Act on January 15, 2019, alleges a violation of Section 57.16007(a) of the Secretary's safety standards and asserts that a mechanic was observed guiding a suspended load with his hand and that no tagline was in place on the load. Specifically, the citation alleges that the mechanic was guiding a transfer case, which was suspended approximately six feet above the ground. Section 57.16007(a) requires that "[t]aglines shall be attached to loads that may require steadying or guidance while suspended." 30 C.F.R. § 57.16007(a).

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury would reasonably be expected to be permanently disabling. She further determined that the condition was S&S, affected one person, and was the result of Respondent's high negligence. The Secretary proposed a penalty of \$15,206.00 for this alleged violation.

Fact of Violation

I find that the Secretary has established a violation of the cited standard because a tagline was not attached to the transfer case while Sarabia was observed steadying it with his hand. The Secretary's regulations do not define "steadying" and the Commission has not addressed the subject standard. In the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines "steadying," the present participle form of the verb

²⁶ In *Freeport-McMoRan Sierrita*, 39 FMSHRC 1105, 1128 (May 2017) (ALJ), I found that a miner guiding a moving suspended load with his hands was not "clear" of the load. In that case the miner was operating in a small, confined area on the bed of a flat-bed truck, which was approximately four feet off the ground. Given the small area in which the miner was working and the fact that he would have to jump off the bed of the truck in order to "exit" the area, I found that it was critical he remain away from the load. Unlike the miner in *Freeport*, Sarabia was standing on the ground with no apparent obstacles nearby and the load he was touching was not moving.

“steady,” as “to make or keep steady.” *Webster's New Collegiate Dictionary* 1129 (1979). The adjective form of “steady” is defined, as relevant to this analysis, as “firm in position: fixed.” Consequently, the cited standard requires that a tagline shall be attached to a suspended load when the load may need to be brought to a fixed position or kept in a fixed position.

I find that the transfer case required steadying and therefore a tagline should have been attached. There is no dispute that Sarabia was observed with his hand on the transfer case. Sarabia himself testified that his hand was on the case for the purpose of preventing it from moving while he worked with his other hand to remove the fittings. By placing his hand on the suspended load for the purpose of preventing motion, Sarabia was “steadying” the load, i.e., keeping it in fixed position. Sarabia testified that, although a tagline was attached during the transportation of the case from behind the pump rig to the side of the rig, the tagline was detached before he began the task of removing the fittings. Because a tagline was not attached to the case at the time Sarabia was steadying the load, as is required by the clear language of the standard, the Secretary established a violation.²⁷

Gravity and S&S

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.

I find that the Secretary failed to establish that the violation was S&S. I have already found that Boart violated the standard because a tagline was not attached to the transfer case at the time Sarabia was steadying it with his hand. Here, the hazard to which the violation allegedly contributes is a miner being unable to safely steady a load due to the lack of a tagline. A tagline is really designed be used when pulling a load into a desired position and it is not clear from the

²⁷ Boart argues that the citation should be vacated because the evidence does not establish that the transfer case required steadying or guidance. Boart Br. 11. However, Boart’s brief concedes that “Sarabia was standing next to the transfer case steadying it[.]” *Id.* at 12.

record whether Sarabia could have used a tagline to steady the transfer case while removing the fittings and draining the oil. He likely would have needed to hold the tagline immediately adjacent to the transfer case in order to keep it steady.

The Secretary, in his brief, argues that Sarabia could have been struck if the transfer case swayed or became detached.²⁸ Sec’y Br. 17. However, given my finding that the case was not in motion and the lift was powered off, there was very little risk of the case swinging. Moreover, the Secretary did not introduce evidence regarding the likelihood of the rigging straps breaking or slipping off the fork or transfer case. The MSHA inspector did not walk over to the transfer case to see whether it securely attached to the fork. Consequently, the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury.

I also find it unlikely that any injury would be sustained. If the case did swing, it would only be because of some outside force, e.g., wind or Sarabia pushing or pulling the case with his hand, and any swinging motion would be minimal. Again, there was no proof that the transfer case would fall from its rigging or that the forks would fall. I find it highly unlikely that any injury would be sustained. As a result, the violation was not S&S and the gravity was low.

Negligence

The Commission has recognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

While the Secretary argues that Boart was highly negligent, I find that Boart’s negligence was only moderate. The inspector relied primarily on two factors in making her negligence determination: (1) her belief that Sarabia and Shumway were unaware of the proper use of taglines, and (2) Boart’s alleged failure to produce training records evidencing that Sarabia had been trained on the use of taglines. Sec’y Br. 18. As explained more thoroughly below in my discussion of the task training order, I find that the Secretary failed to establish that Sarabia was not task trained. Boart was only moderately negligent.²⁹ I assess a penalty of \$275.00.

²⁸ The Secretary made other arguments based on Gonzalez’s testimony that the case was moving at the time she observed the condition. Sec’y Br. 16-18. However, given my credibility determinations above, I need not address those arguments.

²⁹ The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. The operator’s supervision, training, and disciplining are relevant. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995).

D. Order No. 9379555

Order No. 9379555, issued under section 104(g)(1) of the Mine Act on January 15, 2019, alleges a violation of Section 48.27 of the Secretary's safety regulations and asserts that a mechanic was not properly task trained. Specifically, the order alleges that the mechanic failed to demonstrate safe procedures when working with a suspended load. Section 48.7 requires, generally, that miners be properly trained prior to performing new tasks.³⁰ 30 C.F.R. § 48.27.

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury could reasonably be expected to be fatal. She further determined that the condition was S&S, affected one person, and was the result of Respondent's high negligence. The Secretary proposed a penalty of \$33,840.00 for this alleged violation.

Fact of Violation

The Secretary argues that Sarabia's conduct and statements made to Gonzalez by Sarabia and Shumway led her to believe that there was a "lack of training about the hazards of working under suspended loads and the proper use of taglines[.]" Sec'y Br. 19-20. Based on that belief and the lack of direct evidence of Sarabia's task training provided to Gonzalez, the Secretary argues that the order was properly issued. Sec'y Br. 20.

I find that the Secretary failed to establish that Sarabia was not task trained on how to work with a suspended load. In reaching this conclusion I rely primarily on two points. First, Gonzalez premised the issuance of the order on factual assertions that I declined to credit. Gonzalez testified that she issued the order, at least in part, because Sarabia was not using a tagline, was guiding the transfer case with his hand while it was in motion, and was standing under the forks that were 12 feet off the ground. Tr. 53. However, I credited Sarabia's testimony that the transfer case was not in motion and he was not under the forks.

Second, Boart put on considerable evidence that Sarabia had received training on suspended loads and the use of taglines.³¹ Sarabia was an experienced mechanic who had previously worked with suspended loads and taglines. I credit the testimonies of Sarabia,

³⁰ The citation, as modified, was issued for an alleged violation section 48.27. The Secretary, in his brief, states that subsection (c) of the standard is applicable in this instance. Sec'y Br. 19. Section 48.27(c) states that "[m]iners assigned a new task . . . shall be instructed in the safety and health aspects and safe work procedures of the task, including information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program, prior to performing such task." 30 C.F.R. § 48.27(c).

³¹ The Secretary, in his brief, states that Boart never provided Gonzalez with direct evidence of Sarabia having been trained. Sec'y Br. 6-8, 19-23. This court must consider all the evidence presented at a hearing and not just the information that was given to the inspector at the time the order was issued. *See Knife River Const.*, 38 FMSHRC 1289, 1294 (June 2016). I have considered all of evidence of training and not just what the inspector was aware of at the time she issued the order.

Shumway and Hess that the crew gathered in the doghouse the mornings of January 14 and 15 to prepare and review the JHA board by discussing and documenting hazards presented and how to protect against those hazards while replacing the transfer case. Boart's witnesses offered corroborating testimony that suspended loads and taglines were covered during those gatherings. Shumway and Hess testified that, given the nature of the work Boart does, suspended loads and taglines are discussed and encountered almost "every day." Tr. 132, 167, 408. Although Gonzalez never saw the JHA board, at hearing she acknowledged that an appropriately completed job hazard analysis could be used as a training guide for task training. MSHA's own PPM recognizes this fact. Boart Ex. W. Notably, the Secretary did not dispute that the JHA board as displayed in Sec'y Ex. 18 was "appropriately completed."

I also find that Sarabia received other prior training on suspended loads and taglines during MSHA mandated annual refresher training courses. Sarabia attended annual refresher training courses in 2016, 2017 and 2018, as evidenced by the sign-in sheets and signed 5000-23 forms. Boart Ex. R. While Gonzalez believed that the annual refresher training slides sent to her by Spear were "insufficient training" for purposes of satisfying the cited standard, she offered little reasoning why. Sec'y Ex. 10, 11. I credit the testimonies of Spear and Shumway that each eight hour annual refresher training course covered suspended loads and taglines during a slide presentation that was accompanied by a discussion of the slide content.

Sarabia also received relevant training during his OSHA 10 hour certification. Sarabia successfully completed the OSHA 10 hour course in 2012, as evidenced by his signed OSHA training card. Boart Ex. V. I credit the testimonies of Spear and Grange that the OSHA 10 hour training, which every Boart employee must take, covered suspended loads and taglines. Tr. 297-298, 449.³²

Given my analysis, I find that the Secretary failed to establish by a preponderance of the evidence that Sarabia had not been task trained regarding suspended loads and the use of taglines. Order No. 9379555 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's Mine Data Retrieval System website, Boart worked over 1,000,000 hours in each of 2017, 2018 and 2019, which correlates with a large contractor. 30 C.F.R. § 100.3 Table V. The parties have stipulated that the penalties, if affirmed, will not affect Boart's ability to remain in business. Boart has a history of 19 paid citations since October 17, 2017 issued at all mines where it was working, only one of which was designated as S&S. Sec'y Ex. 20. It has no history of previous citations at the Leeville Mine. The gravity and negligence of Citation No. 9379549 are discussed above. Citation No. 9379549 was timely abated. Sec'y Br. p. 3. Based on the penalty criteria I assess a penalty of \$275 for Citation

³² While not critical to my analysis, I do take note of training Sarabia received from Barrick, another mine operator, in June of 2018 that specifically covered working under suspended loads. Boart Ex. T; Tr. 377-378. Further, I note that Sarabia had access to Boart's "EHS Management System Field Reference" document, which references staying away from suspended loads. Boart Ex. L p. BOART 000196.

No. 9379549. This penalty is similar to the penalty that would be assessed using the Secretary's penalty point system at 30 C.F.R. § 100.3.

III. ORDER

For reasons set forth above, Citation No. 9379548 and Order No. 9379555 are **VACATED**. Citation No. 9379549 is **MODIFIED** to a non-S&S violation with moderate negligence. Boart Longyear Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$275 within 40 days of the date of this decision.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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